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October 19, 2012

Jeff S. Jordan, Esq.
Supervisory Attorney
Complaints Examination & Legal Administration
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 6631

Dear Mr. Jordan:

I write on behalf of my clients, Representative Howard Berman, Berman for Congress, and Bruce Corwin, Treasurer (collectively, "Respondents"), in response to the complaint in the above-referenced matter. The complaint fails to state a violation of the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.*, and should be dismissed.

FACTUAL DISCUSSION

The Complaint hinges on two payments by Respondents to Berman & D'Agostino, a California political consulting firm.¹ The Complaint alleges that, because the company is associated with Michael Berman, the candidate's brother, Respondents converted campaign funds to personal use in violation of 2 U.S.C. § 439a(b).

¹ The Complaint reaches back eighteen years to make allegations about the campaign's payments to Berman & D'Agostino, and to another company associated with Michael Berman. In so doing, it wholly ignores 28 U.S.C. § 2462, which imposes a five-year statute of limitations on the Commission when seeking civil penalties in court. The two payments alleged by the Complaint that fall within the limitations period are: (1) a payment of \$90,000 on November 19, 2010, to Berman & D'Agostino for "Political Campaign Consulting Services"; and (2) a payment of \$80,000 on October 10, 2008, to Berman & D'Agostino for "Political Campaign Consulting Fee." See Berman for Congress, 2010 Amended Post-General Report, at 17; 2008 Pre-General Report at 11.

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Berman & D'Agostino is "a high-power political consulting firm" in California, having represented a wide range of candidates and initiatives, as well as the interests of Democratic legislators in the redistricting process over the past three decades. Alan C. Miller, *Mr. Inside & Mr. Outside*, L.A. TIMES MAGAZINE, Mar. 29, 1992, at 18. Having worked as a political consultant even before Representative Berman was elected to Congress, Michael Berman has been described as the "Mr. Inside of Southern California's most potent collective political force ...". *Id.* He and his partner, Carl D'Agostino, have been publicly acknowledged as "exceptionally talented" in all aspects of political strategy. *Id.*

Berman & D'Agostino served as Representative Berman's de facto campaign manager and strategic advisor in the 2010 and 2008 cycles, and in previous cycles also. The notion that their hiring was motivated by considerations of personal use has been emphatically rejected, even within the reform community. "Mike Berman is, by consensus, the top political consultant out there," said Norman Ornstein of the American Enterprise Institute to the *Los Angeles Daily News* in 2005. Lisa Friedman, *Local Congressmen Paid Kin; Politicians Defend Hiring Family Members*, L.A. DAILY NEWS, Apr. 14, 2005, at N4. The newspaper reported that Mr. Ornstein, when asked about Representative Berman's engagement of Michael Berman's companies, "said he sees no problem with Berman's situation." *Id.*

The sole factual basis for the Complaint is a report issued by Citizens for Responsibility and Ethics in Washington, which identified 82 Members of Congress who supposedly hired family members through campaigns, leadership PACs and public offices. Complaint at 1. The report does not contend or even suggest that Berman & D'Agostino failed to provide bona fide services to Respondents, or were paid more than fair market value. It simply notes Respondents' payments to the firm, and criticizes them on the belief that hiring a firm associated with a candidate's relative, however talented, is inherently untoward.

With no other basis to claim a violation, the Complaint points to the supposed weakness of Representative Berman's past political opponents, and speculates that Berman & D'Agostino provided so-called "imaginary consulting services." Complaint at 1. However, the Complaint overlooks the facts that Representative Berman's success, both in deterring and defeating his opponents, owed in no small part to the strategic advice he received; that Berman & D'Agostino did not simply provide voter contact services, but general strategic consulting advice on a wide range of political matters, including redistricting, which was a major concern in California in 2008 and 2010; and that Berman & D'Agostino was unquestionably well qualified to provide these services, which Respondents were not otherwise receiving from others. There is no legitimate question that Berman & D'Agostino fully performed the services described, and that Respondents received full value for what they paid.

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LEGAL DISCUSSION

The Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002, allows campaigns to spend their funds "for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate" and "for any lawful purpose" other than personal use. 2 U.S.C. §§ 439a(a). While the Act prohibits the conversion of campaign funds to personal use, it defines "personal use" to encompass only those expenses "that would exist irrespective of the candidate's election campaign or ... duties as a holder of Federal office ..." *Id.* § 439a(b)(2).

It has long been axiomatic that, "under the Act and Commission regulations, a candidate and the candidate's campaign committee have wide discretion in making expenditures to influence the candidate's election ..." Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,972 (2002). Hence, there is no prohibition on hiring a candidate's family member, let alone an established political consulting firm with which he or she is associated. *See* 11 C.F.R. § 113.1(g)(1)(i)(H) (treating salary payments to a candidate's family as per se personal use only when he or she is not providing bona fide services, and only when he or she receives salary in excess of fair market value). The Commission has approved candidates' proposals to engage even their spouses individually as consultants or employees, so long as the services were bona fide and paid for at fair market value. *See* FEC Advisory Opinions 2001-10 and 1992-04.

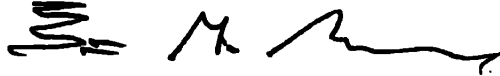
The Commission dismissed a complaint materially indistinguishable from this one in MUR 5701. In that case, the principal campaign committee of a Member of Congress from California engaged the Member's wife, through her sole proprietorship, to raise funds for his campaign. *See* First General Counsel's Report, MUR 5701, at 1. The Member's opponent claimed that the campaign was "diverting" funds to a "sham" company, and hence to the Member's own household. *Id.* Because the company was, in fact, not a sham, and because the complaint presented no information to suggest that the company "did not do bona fide work or was paid more than fair market value for its work", the Office of General Counsel recommended dismissal. *Id.* at 5. The Commission agreed and unanimously found no reason to believe that any violation occurred.

Dismissal is warranted here as well. Filed on behalf of a political opponent, the Complaint relies entirely on speculation, as the complaint in MUR 5701 did. *See* 11 C.F.R. § 111.4(c) (2012). *See also* Statement of Reasons, MUR 4960 (rejecting "[u]nwarranted legal conclusions from asserted facts ... or mere speculation" as a basis for complaint). The Complaint presents no facts to claim that the services were not bona fide, or that the payments exceeded fair market value. It entirely ignores the undeniable fact that Respondents sought and obtained strategic consulting advice from one of California's premiere political firms.

Jeff S. Jordan, Esq.
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For the foregoing reasons, Respondents respectfully request the Commission to dismiss the complaint immediately.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Brian G. Svoboda', written over a horizontal line.

Brian G. Svoboda
Counsel to Respondents